

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
PUBLIC UTILITIES COMMISSION)
)
Instituting a Proceeding to Investigate the)
Implementation of Feed-in Tariffs.)
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**ALEXANDER & BALDWIN, INC. through its division
HAWAIIAN COMMERCIAL & SUGAR COMPANY'S
PRELIMINARY RESPONSES TO THRESHOLD LEGAL QUESTIONS
IN APPENDIX C OF SCOPING PAPER**

AND

CERTIFICATE OF SERVICE

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TO THE HONORABLE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:

Pursuant to the Hawaii Public Utilities Commission's (the "Commission") directive, ALEXANDER & BALDWIN, INC., through its division, HAWAIIAN COMMERCIAL & SUGAR COMPANY, a Hawaii corporation ("HC&S") hereby submits to the Commission its Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper on feed-in tariffs, "Feed-in Tariffs: Best Design Focusing Hawaii's Investigation", issued by the Commission on December 11, 2008. Please note that because this investigatory proceeding has just begun, it would be premature for HC&S to have done a full legal analysis of the issues until it has an opportunity to review the many other information and documents yet to be submitted in this Docket in accordance with the procedural order and schedule yet to be developed by the Commission. Thus, HC&S respectfully reserves its right to further elaborate and/or change its responses in its future submissions in this Docket.

Threshold Issues (Legal)

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:

a) Is this result permissible under current Hawaii statutes?

Response: An argument could be made that it is. HRS § 269-27.2 (c) states, "The rate payable by the public utility to the producer for the nonfossil fuel generated electricity supplied to the public utility shall be as agreed between the public utility and the supplier and approved by the public utilities commission. . . ."

However, it is important to note that the statute also states, "[i]n the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the [C]ommission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy." (Emphasis added). Because HC&S's understanding is that the proposed feed-in tariff to be considered by the Commission in this proceeding would be solely applicable to "nonfossil fuel generated electricity" supplied to the HECO Companies, HC&S believes that this language appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost.

b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

Response: Arguably not, as long as the price is agreed upon by the public utility and the producer of the nonfossil fuel generated electricity, and approved by the Commission.

Again, it is important to note, however, that the statute language also appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost. See the response to part a) above.

c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

Response: If it is decided in this proceeding that a feed-in tariff price that exceeds the utility's avoided cost is not permissible under current Hawaii statutes, the statutes may have to be amended or

the feed-in tariff price could be made permissible if it can be demonstrated that the payments to be made by the utility at the proposed feed-in tariff price on average over the period in question will not exceed the utility's estimates of what its average avoided costs will be over the period in question.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.

- a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:
 - i) evidence of actual costs to develop similar projects in Hawaii
 - ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology
 - iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

Response: The Commission should be able to weigh and consider any and all types of evidence that it deems to be relevant and/or material in addressing the feed-in tariff pricing scheme being proposed or that should otherwise be established. Evidence should also be provided to demonstrate that the feed-in tariff pricing scheme ultimately established promotes, and does not unduly detriment, the facilitation of renewables in the State of Hawaii, pursuant to HRS § 269-6(b) (which specifically allows the Commission to "consider the need for increased renewable energy use in exercising its authority and duties" under HRS Chapter 269).

- b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it the Commission, under the procedural schedule proposed by the signatories?

Response: HC&S continues to support Haiku Design and Analysis' Proposed Procedural Order filed on December 22, 2008.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.

- a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

Response: The distinction being made between "state law right to sell" and "PURPA right to sell" is unclear.

It is HC&S's understanding that PURPA requires that the public utility buy power from Qualifying Facilities offering to sell its power at or below the public utility's avoided cost. PURPA does not say that the public utility cannot pay above its avoided cost.

b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to cost it would have incurred under the state-mandated feed-in tariff?

Response: It depends on whether the seller is a Qualifying Facility.

c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

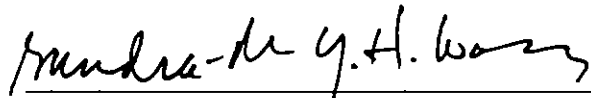
Response: In a perfect world, the tariff offers the developer more certainty in regards to price, thus the developer does not have to spend time negotiating with the public utility over the public utility's avoided costs. This certainty in turn would lead to reducing the time it takes to negotiate a Power Purchase Agreement ("PPA") with the public utility and also reduce the cost of financing the renewable project. Also, since the Commission has already approved the feed-in tariff with input from the Consumer Advocate, it will also reduce the time to get the PPA approved by the Commission.

d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

Response: Feed-in tariffs and existing PURPA rights are two distinct mechanisms to encourage renewable energy in the State of Hawaii, and one should not be eliminated because of the adoption of the other. Nor should either in encouraging *new* renewable energy in the State of Hawaii be used to curtail and/or discourage *existing* renewable energy projects in the State of Hawaii.

Respectfully submitted.

DATED: Honolulu, Hawaii, January 12, 2009.

A handwritten signature in cursive script, reading "Sandra-Ann Y.H. Wong", written in black ink.

SANDRA-ANN Y.H. WONG

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The foregoing Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper was served on the date of filing by hand delivery or electronically transmitted to each such Party.

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